No. 16-1432

IN THE

Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,

Petitioners,

v.

KAYE MELIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE WOMEN'S LAW PROJECT, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, ATLANTA WOMEN FOR EQUALITY, A BETTER BALANCE, CALIFORNIA WOMEN'S LAW CENTER, FEMINIST MAJORITY FOUNDATION, GENDER JUSTICE, LEGAL MOMENTUM, LEGAL VOICE, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, PENSION RIGHTS CENTER, SOUTHWEST WOMEN'S LAW CENTER, AND WOMEN'S INSTITUTE FOR A SECURE RETIREMENT IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 9

I. REVOCATION-ON-DIVORCE STATUTES DISPARATELY HARM WOMEN 10

A. Revocation-on-divorce statutes more frequently revoke beneficiary designations of women, and deprive women of larger benefits than men 11

B. Revocation-on-divorce statutes disparately affect financially vulnerable divorced women 16

C. Revocation-on-divorce statutes penalize women's choice to marry 18

II. NO SIGNIFICANT AND LEGITIMATE PUBLIC PURPOSE JUSTIFIES APPLYING REVOCATION-ON-DIVORCE STATUTES RETROACTIVELY 21

A. Revocation-on-divorce statutes rely on an outmoded conception of ex-spousal relationships 22

B. Revocation-on-divorce statutes are irrationally founded on contradictory assumptions about decedents' personal responsibility and create legal complexity 27

III. APPLYING REVOCATION-ON-DIVORCE STATUTES RETROACTIVELY IS NOT A REASONABLE OR APPROPRIATE MEANS TO EFFECTUATE A DECEDENT'S INTENT 31

A. Revocation-on-divorce statutes' disparate impact on women make them unreasonable means of advancing the state's purpose 32

B. There are solutions available to states that are far more likely to effectuate a decedent's intent than revocation-on-divorce statutes 34

CONCLUSION 36

APPENDIX OF AMICI STATEMENTS OF INTEREST 1a

TABLE OF AUTHORITIES

CASES

Page

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234 (1978) 9, 22, 32, 34

Am. Gen. Life Ins. Co. v. Jenson,
2012 WL 848158 (D.S.D. Mar. 12, 2012) 29

Califano v. Goldfarb,
430 U.S. 199 (1977) 5

Califano v. Webster,
430 U.S. 313 (1977) 5

Daughtry v. McLamb,
512 S.E.2d 91 (N.C. Ct. App. 1999) 23

Egelhoff v. Egelhoff,
532 U.S. 141 (2001) 24

Energy Reserves Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1982) ..... *passim*

Exxon Corp. v. Eagerton,
462 U.S. 176 (1983) 21, 22

Hadfield v. Prudential Ins. Co.,
973 A.2d 387 (N.J. Super. Ct. App. Div. 2009) 26

Hughes v. Scholl,
900 S.W.2d 606 (Ky. 1995) 23

In re Adams' Estate,
288 A.2d 514 (Pa. 1972) 24

In re Estate of Rock,
612 N.W.2d 891 (Minn. Ct. App. 2000) 23

In re Workers' Comp. Fund,
46 F.3d 813 (8th Cir 1995) 5, 30

Kujawinski v. Kujawinski,
376 N.E.2d 1382 (Ill. 1978) 33

Lazar v. Kroncke,
862 F.3d 1186 (9th Cir. 2017) 29

Lazar v. Kroncke,
petition for cert. pending, No. 17-521 (filed
Oct. 3, 2017) 2

McCoy v. McCoy,
27 N.W.2d 62 (Mich. 1947) 4

Metro. Life Ins. Co. v. Church,
389 N.W.2d 124 (Mich. App. 1986) 20

Metro. Life Ins. Co. v. Gorman-Hubka,
159 F. Supp. 3d 668 (E.D. Va. 2016) 28

Metro. Life Ins. Co. v. Melin,
853 F.3d 410 (8th Cir. 2017) 23

Minn. Mut. Life Ins. Co. v. Hendrick,
25 N.W.2d 189 (Mich. 1946) 4

MONY Life Ins. Co. v. Ericson,
533 F. Supp. 2d 921 (D. Minn. 2008) 23, 29

Nat'l Auto. Dealers & Assocs. Ret. Tr. v.
Arbeitman, 89 F.3d 496 (8th Cir. 1996) 26

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 5

Ohio State Life Ins. Co. v. Garcia,
2002 WL 31867906 (Ohio Ct. App. Dec. 24, 2002) 20

Parsonese v. Midland Nat'l Ins. Co.,
706 A.2d 814 (Pa. 1998) 8, 24, 27, 33

Ping v. Denton,
562 S.W.2d 314 (Ky. 1978) 20

Sever v. Mass. Mutual Life Ins. Co.,
944 S.W.2d 486 (Tex. App. 1997) 28

Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund,
343 F.3d 1311 (10th Cir. 2003) 19, 27

Strachan v. Prudential Ins. Co. of Am.,
73 N.E.2d 840 (Mass. 1947) 20

U.S. Tr. Co. of New York v. New Jersey,
431 U.S. 1 (1977) 10, 31, 32, 34

Univ. of Hawaii Prof. Assembly v. Cayetano,
183 F.3d 1096 (9th Cir. 1999) 32

Whirlpool Corp. v. Ritter,
929 F.2d 1318 (8th Cir. 1991) 22, 23, 27

CONSTITUTIONAL PROVISIONS, STATUTES

1939 Mich. Pub. Acts No. 220 4

1982 Mich. Pub. Acts No. 184 4

20 Pa. Stat. and Cons. Stat. Ann. § 6111.2 3

Cal. Prob. Code § 5040 3

Fla. Stat. Ann. § 61.55 25

Mich. Comp. Laws Ann. § 552.101 4

Minn. Stat. Ann. § 524.2-804 3

Mo. Rev. Stat. § 461.051 3

Mo. Rev. Stat. §461.073 3

N.J. Stat. Ann. § 2A:23D-2 25

U.S. Const., art. I, § 10 2

Unif. Probate Code § 2-804 ..... 3, 19

Utah Code Ann. § 30-3-5 35

Va. Code Ann. § 20-111.1 35

OTHER AUTHORITIES

Abigail Geiger & Gretchen Livingston, *8 Facts on Love and Marriage in America*, Pew Research Ctr. (Feb. 13, 2017) 20

Am. Council of Life Insurers, *Life Insurers Fact Book 2016* (2016) 12

Barbara A. Butrica & Karen E. Smith, *The Retirement Prospects of Divorced Women*, 72 Soc. Sec. Bull. 11 (2012) 17

Betsey Sevenson & Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces*, 21 J. Econ. Persp. 27 (2007) 19

Brief for United States as *Amicus Curiae* Supporting Petitioner, *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (No. 99-1529), 2000 WL 1168615..... 25

Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803 (1985) 31

Conor Dougherty, *Children of Divorce More Likely to Be Poor*, Wall St. J., Aug. 25, 2011.... 18

Craig Copeland, *Individual Retirement Account Balances, Contributions, and Rollovers, 2012; With Longitudinal Results 2010–2012: The EBRI IRA Database*, EBRI Issue Brief No. 399 (May 2014)..... 13

Ctrs. for Disease Control & Prevention, U.S. Dep't Health & Human Servs., Nat'l Vital Statistics Rep. No. 65-04, *Deaths: Final Data for 2014* (2016)..... 15

Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 Fam. Rel. 317 (2002)..... 25

Diana B. Elliott & Tavia Simmons, U.S. Census Bureau, *Marital Events of Americans: 2009* (2011) 17

Facts About Life 2011, LIMRA (Sept. 2011)..... 12

HealthView Services, *The High Cost of Living Longer: Women and Retirement Health Care* (2016) 16

Jennifer Erin Brown et al., Nat'l Inst. on Ret. Sec., *Shortchanged in Retirement: Continuing Challenges to Women's Financial Future* (Mar. 2016) 13, 15

John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases:* Hillman *Doubles Down on* Egelhoff, 67 Vand. L. Rev. 1665 (2014) 5, 7, 22

Kristen P. Raymond, Note, *Double Trouble - an Ex-Spouse's Life Insurance Beneficiary Status & State Automatic Revocation Upon Divorce Statutes: Who Gets What?*, 19 Conn. Ins. L.J. 399 (2013) 30

Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 Fam. L.Q. 215 (2016) 20, 21

Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683 (1992) 19

Leslie Bennetts, *Census Data Reveals Elder Women's Poverty Crisis*, The Daily Beast (Mar. 28, 2012) 15

Life Happens & LIMRA, *2017 Insurance Barometer Study* (2017) 13, 14

LIMRA: Women Still Lag Men in Life Insurance Ownership, LIMRA (Nov. 16, 2016) 12

Maria Cancian et al., *Who Gets Custody? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 Demography 1381 (2014) 26

Mikki D. Waid, AARP Pub. Pol'y Inst., *An Uphill Climb: Women Face Greater Obstacles to Retirement Security* (2013) 14, 15, 16

Nonprobate Transfers: Hearing on H.B. 644 Before the H. Comm. on Ins., 91st Gen. Assemb., Reg. Sess. (Mo. 2001)..... 24

Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 Berkeley J. Emp. & Lab. L. 351 (2004) 14

Pension Rights Ctr. & Nat'l Women's Law Ctr., *Comments to ERISA Advisory Counsel* (2012) 35

Raymond H. Young, *Probate Reform*, 18 Bos. B.J. 7 (1974)..... 7

Renee Stepler, *Led by Baby Boomers, Divorce Rates Climb for America's 50+ Population*, Pew Research Ctr. (Mar. 9, 2017)..... 25

Richard Fry, *No Reversal of the Decline in Marriage*, Pew Research Ctr., (Nov. 20, 2012)..... 20

Sandra Yin, *Older Women, Divorce, and Poverty*, Population Reference Bureau (Mar. 2008) 17, 18

U.S. Soc. Sec. Admin., *Income of the Population 55 or Older, 2014* (2016)..... 17

U.S. Cong. Joint Econ. Comm. Chairman's Staff, 112th Cong., *The Gender Wage Gap Jeopardizes Women's Retirement Security* (2011) 14

U.S. Gov't Accountability Office, GAO-12-699, *Retirement Security: Women Still Face Challenges* (2012) 17

Women's Inst. for a Secure Ret., *The Pay Gap's Connected to the Retirement Gap* (2017).....14

INTEREST OF AMICI CURIAE[1]

Amici are fourteen organizations dedicated to the promotion of gender equality and the advancement of social and economic opportunity for women and girls. Several *amici* hail from a particular region or state. Many are national in scope. All of them share a common belief—that persistent disparities in societal and economic power between women and men, which have been perpetuated in part by effectively discriminatory public policies, can and must be neutralized.

Amici are committed to finding solutions to the various financial challenges that women uniquely face. They are engaged in numerous initiatives toward that end, including legal advocacy, public outreach and education, individual counseling, and policy research.

The *amici* filing this brief are: The Women's Law Project, American Association of University Women, Atlanta Women for Equality, A Better Balance, California Women's Law Center, Feminist Majority

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[1] Counsel for Petitioners and Respondent have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no persons other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

Foundation, Gender Justice, Legal Momentum, Legal Voice, National Partnership for Women & Families, National Women's Law Center, Pension Rights Center, Southwest Women's Law Center, and Women's Institute for a Secure Retirement. Individual statements of interest of *amici* are attached as an Appendix.

* * *

In addition to filing this brief, several *amici* also filed a brief in support of the petition for certiorari in *Lazar v. Kroncke*, *petition for cert. pending*, No. 17-521 (filed Oct. 3, 2017). Like the instant case, *Lazar* concerns whether the retroactive application of state revocation-on-divorce statutes violates the Contract Clause.[2] The primary difference is the type of contract at issue—the beneficiary designation in *Lazar* concerned an individual retirement account, whereas this case involves the beneficiary of a life insurance policy. The *Lazar* petition is pending, and its disposition may be determined by the outcome of this case.

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[2] U.S. Const., art. I, § 10, cl. 1.

SUMMARY OF ARGUMENT

Automatic revocation-on-divorce (ROD) statutes, like the Minnesota statute at issue here,[3] are legislative decisions about "the identity"[4] of who should receive certain personal property—specifically, a decedent's non-probate assets such as the proceeds of a life insurance policy or individual retirement account (IRA).[5] ROD statutes exist in at least 26 states[6] and are predicated on the notion that

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[3] Minn. Stat. Ann. § 524.2-804.

[4] Pet. Br. 4, 13, 30, 31, 33, 39, 40.

[5] The non-probate assets affected by ROD statutes also can include the proceeds of annuities, revocable inter-vivos trusts, and other transfer-on-death accounts or benefits.

[6] Pet. Br. 8-9 nn.1-2 (collecting statutes). Fifteen states (including Minnesota) modeled their ROD statutes on Section 2-804 of the Uniform Probate Code (UPC), which, *inter alia*, "revokes any revocable . . . disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument" automatically upon a divorce, "[e]xcept as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate . . . ." Unif. Probate Code § 2-804(b)(1)(A). Other states have enacted ROD statutes that depart from the UPC model to varying degrees. *See, e.g.*, Cal. Prob. Code § 5040(e) (excluding life insurance from ROD provision); Mo. Rev. Stat. §§ 461.051, 461.073(6) (same); 20 Pa. Stat. and Cons. Stat. Ann. § 6111.2 (revoking beneficiary designations "unless it appears the designation was intended to survive the divorce based on" certain evidence).

an ex-spouse is presumptively an inappropriate recipient of such assets.

On their face, modern ROD statutes appear gender neutral: they apply to ex-husbands just as they apply to ex-wives. Their history, however, is not benign. Earlier versions of ROD-like statutes revoked only a wife's beneficiary status while leaving a husband's status in place.[7] That discriminatory legacy lives on today because ROD statutes, as applied in the real world, significantly and disparately harm women, who are less likely than men to hold sufficient assets for a stable retirement. Consequently, an unplanned revocation of benefits

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[7] *See, e.g.*, 1939 Mich. Pub. Acts No. 220 (codified at Mich. Comp. Laws Ann. § 552.101) (requiring that "every decree of divorce shall determine all rights of the *wife* in and to the proceeds of any policy or contract of life insurance, endowment or annuity upon the life of the husband in which she was named or designated as beneficiary" *and* "that unless otherwise ordered in said decree such policy or contract shall thereupon become and be payable to the estate of the *husband* or to such named beneficiary as he shall affirmatively designate") (emphasis added); *McCoy v. McCoy*, 27 N.W.2d 62, 64 (Mich. 1947) (applying statute to order payment of insurance proceeds to husband's estate); *Minn. Mut. Life Ins. Co. v. Hendrick*, 25 N.W.2d 189, 191 (Mich. 1946) (same); 1982 Mich. Pub. Acts No. 184 (amending statute to be gender neutral: "[i]f the decree of divorce does not determine the rights" of a surviving ex-wife *or ex-husband* then the policy shall be payable to the estate of the decedent) (emphasis added).

for a divorced woman can—and often does—lead to particularly dire financial consequences.[8]

Although commentators supporting ROD statutes contend there is "no federal policy favoring wealth transfer to ex-spouses,"[9] it is also true that the "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective."[10] And under the Contract Clause, "[l]egislative perception regarding the more worthy recipient does not render a complete divestiture of contractual rights a legitimate state interest."[11] Indeed, Petitioners acknowledge that the Court must take into account certain "practical considerations" in determining

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[8] Of course, civil marriage is no longer exclusively heterosexual. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The retroactive application of ROD statutes, however, disproportionately impacts former wives of men, due to a variety of circumstances that are addressed in this brief.

[9] John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases:* Hillman *Doubles Down on* Egelhoff, 67 Vand. L. Rev. 1665, 1666 (2014).

[10] *Califano v. Webster*, 430 U.S. 313, 316–17 (1977); *see Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977) ("redressing our society's longstanding disparate treatment of women" is a "permissible" state purpose).

[11] *In re Workers' Comp. Fund*, 46 F.3d 813, 821 (8th Cir 1995).

whether to uphold ROD statutes, such as whether they "protect divorcing wives from financial harm" and whether they "significantly alter asset distribution in divorce."[12] Because ROD statutes disparately harm women who marry, they apply a one-size-fits-all rule that penalizes a woman's choice to marry just as increasingly diverse and individualized non-marital relationship patterns are expanding. The fact that ROD statutes, as applied, disproportionately strip benefits from divorcing wives weighs against their validity under the Contract Clause.

"A person's testamentary intent is the polestar that must guide all those responsible for effectuating a person's estate plan."[13] ROD statutes like Minnesota's, however, are inherently ill-suited to effectuating intent. They apply automatically to disinherit all ex-spouses regardless of contrary indications of intent.

The "polestar" for ROD statutes thus has little, if anything, to do with intent. Instead, ROD statutes are guided by an unfounded, outmoded assumption that "[d]ivorce usually represents a stormy parting, where the last thing one of the parties wishes is to

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[12] Pet. Br. 26-27.

[13] Am. Coll. of Trust and Estate Counsel *Amicus* Br. 2.

. . . giv[e] everything to the former spouse."[14] In Petitioners' estimation, a blanket policy founded on that assumption will, "in the mine run of cases," yield the correct result.[15] But Petitioners' blind faith in this assumption is belied by recent developments in the nature of divorce and ex-spousal relationships—not to mention the numerous decisions by state courts and legislatures which have recognized significant reasons why a divorced individual might want to maintain an ex-spouse as a beneficiary.

Of course, states may enact misguided laws so long as they comport with the Constitution. Here, however, Minnesota's ROD statute applies *retroactively*, such that it nullifies beneficiary designations made pursuant to valid contracts executed before the statute was enacted. Under the Contract Clause, if a state regulation substantially impairs a pre-existing contractual obligation, it is unconstitutional unless it (1) seeks to achieve a "significant and legitimate public purpose"; and (2) is based on "reasonable conditions" and is "of a

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[14] Langbein, *supra* note 9, at 1669 n.14 (quoting Raymond H. Young, *Probate Reform*, 18 Bos. B.J. 7, 11 (1974)).

[15] Pet. Br. 57.

character appropriate to the purpose justifying [its] adoption."[16]

Retroactive ROD statutes fail this test. They rewrite an essential term of contracts pertaining to descendable non-probate assets—the beneficiary designation—and thus severely, if not totally, impair the rights and obligations of contracting parties.[17] In light of the severity of this impairment, which is described at length in Respondent's brief, ROD statutes cannot be saved under a state justification theory for two principal reasons.[18]

First, there is no significant and legitimate public purpose that justifies applying ROD statutes retroactively. ROD statutes' purported public purpose—to vindicate a divorced individual's *presumed* intent—derives from an inaccurate and obsolete conception of divorce. ROD statutes are also founded on fundamentally contradictory assumptions and cause needless legal complexity.

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[16] *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1982).

[17] *See Parsonese v. Midland Nat'l Ins. Co.*, 706 A.2d 814, 818 (Pa. 1998).

[18] *See* Resp. Br. 33-52. In light of Respondent's detailed discussion of impairment, this brief focuses on the deficiencies in purported state justifications for ROD statutes.

Second, retroactively applying ROD statutes is neither a reasonable nor an appropriate means of effectuating a decedent's intent. Even if the Court were to agree with Petitioners that these statutes produce some marginal benefit in "vindicating presumed intent,"[19] any benefit is overwhelmingly outweighed by the significant and disparate harm ROD statutes cause to women. Moreover, the states have available several other approaches that, when compared to ROD statutes, are both more likely to effectuate intent and less destructive of existing contractual rights and obligations. Accordingly, to the extent they apply retroactively, ROD statutes like Minnesota's violate the Contract Clause.

ARGUMENT

This Court has recognized that "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[20] Thus, if a state regulation constitutes a "substantial impairment" of a contractual relationship, the regulation will survive judicial

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[19] Pet. Br. 2, 16, 47, 48, 57, 59.

[20] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978) (emphasis in original).

scrutiny only if two conditions are met. *First*, "the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem."[21] *Second*, the regulation "must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."[22]

Retroactive ROD statutes like Minnesota's fall short of this standard. They are neither adequately justified by a legitimate public purpose, nor sufficiently tailored to their purported rationale. Instead, they unnecessarily threaten the financial and retirement security of millions of divorced women for little public benefit. Accordingly, these statutes violate the Contract Clause.

I. REVOCATION-ON-DIVORCE STATUTES DISPARATELY HARM WOMEN

As Petitioners recognize, the practical implications of the statute at issue impact the Court's Contract Clause analysis.[23] For this reason, it is important for the Court to consider the

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[21] *Energy Reserves Grp.*, 459 U.S. at 411-12.

[22] *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977).

[23] *See* Pet. Br. 25-28, 35-38.

significant and disparate impact ROD statutes have on women.

The primary effect of ROD statutes is to revoke beneficiary designations for non-probate assets like life insurance policies and IRAs—assets that women are less likely to hold than men, and hold in substantially smaller amounts. Thus, in reality, these statutes revoke the beneficiary status of *far more* ex-wives than ex-husbands and with *far greater* financial harm to ex-wives when they do. Moreover, ROD statutes apply at a moment when women are in a particularly vulnerable financial position—after a divorce. As a result, ROD statutes more often have a financially devastating impact on divorced women than they do on divorced men.

A. Revocation-on-divorce statutes more frequently revoke beneficiary designations of women, and deprive women of larger benefits than men

Although ROD statutes appear gender neutral on their face, the assets that they target are unevenly distributed between men and women. This leads to effects that are considerably skewed—ROD statutes affect the disposition of assets that would have gone to benefit an ex-wife more often and in greater amounts than they affect ex-husbands.

Take, for example, the asset at issue in this case: life insurance. As of 2016, 56% of women had life

insurance coverage compared to 62% of men.[24] Even as recently as 2010, the gap was smaller—57% for women and 61% for men.[25] Thus, the disparity is increasing. And among the women who *do* have life insurance, the dollar amount of their coverage is on average between 22% and 31% less than what men have.[26] These disparities hold true for women of all ages and even for women with high personal incomes.[27] Their significance is magnified by the enormous size of the life insurance industry: Americans' individual life insurance coverage totaled some $12.3 trillion in 2015.[28] Thus, even a one

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[24] *LIMRA: Women Still Lag Men in Life Insurance Ownership*, LIMRA (Nov. 16, 2016), https://goo.gl/WX78Ef.

[25] *Id.*

[26] *Id.* (the amount of coverage men purchase is on average $206,357, whereas women purchase only $160,782); *Facts About Life 2011*, LIMRA (Sept. 2011), https://goo.gl/CVmp6o ("On average, women have $129,800 of individual life insurance, while men have $187,100 of individual life insurance coverage.").

[27] *Facts About Life 2011*, *supra* note 26 ("Women of all ages average smaller amounts of individual life coverage than men of similar ages . . . Women with high personal incomes ($100,000+) are less likely to have individual life insurance or group life insurance than men with similar personal incomes.").

[28] Am. Council of Life Insurers, *Life Insurers Fact Book 2016*, at 63, 66 tbl.7.1 (2016), https://goo.gl/9hvS5W.

percent differential in coverage amounts leads to a disparity in holdings of over $120 billion.

Similar trends exist for other non-probate assets affected by ROD statutes, such as IRAs. Multiple studies have shown that men's average IRA holdings are anywhere from 41% to 115% higher than women's.[29] According to one analysis of 2012 data, while the median IRA account balance for men age 70 and older was $102,097, the median account balance for similarly aged women was $56,371—an 81% difference. Life insurance disparities are also relevant to retirement income security—52% of life insurance owners list supplementing retirement income as a reason for purchasing life insurance.[30]

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[29] *See* Craig Copeland, *Individual Retirement Account Balances, Contributions, and Rollovers, 2012; With Longitudinal Results 2010–2012: The EBRI IRA Database*, EBRI Issue Brief No. 399, at 7 (May 2014), https://goo.gl/dH8221 ("Males had higher individual average and median balances than females: $139,467 and $36,949 for males, respectively, vs., $81,700 and $25,969 for females . . . Across all ages, males had both higher individual average and median balances than females . . . ."); Jennifer Erin Brown et al., Nat'l Inst. on Ret. Sec., *Shortchanged in Retirement: Continuing Challenges to Women's Financial Future*, at 9-10 (Mar. 2016), https://goo.gl/gr5o6t (on average, women saved less than men in their IRAs, with an average account balance for men of $56,429, which is 115% larger than the average of $26,307 for women).

[30] Life Happens & LIMRA, *2017 Insurance Barometer Study* 7, 20 (2017), https://goo.gl/wkV83U.

Women express consistently higher levels of financial concern than men when it comes to savings, retirement security, and health-related expenses.[31] This is hardly surprising because women face a financial catch-22 as they age—they tend to have fewer resources but higher costs.

There are a number of reasons why women tend to have fewer resources as they age. Women face income inequality throughout their working lives, both during their careers and in retirement.[32] Women also spend more time out of the workforce in caregiving roles—for both children and elder family members—leading to even greater disparities in lifetime earnings.[33] Moreover, while the gap has

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[31] *Id.* at 16.

[32] Mikki D. Waid, AARP Pub. Pol'y Inst., *An Uphill Climb: Women Face Greater Obstacles to Retirement Security* 1 (2013), https://goo.gl/tdU79o; U.S. Cong. Joint Econ. Comm. Chairman's Staff, 112th Cong., *The Gender Wage Gap Jeopardizes Women's Retirement Security* 2 (2011), https://goo.gl/KnQpt9 ("Lower earnings over the course of their careers jeopardize women's retirement security."); Women's Inst. for a Secure Ret., *The Pay Gap's Connected to the Retirement Gap* (2017), https://goo.gl/gRTfpx.

[33] Waid, *supra* note 32, at 1 (women take an estimated 12 years out of the work force as a result of caregiving); Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 Berkeley J. Emp. & Lab. L. 351, 360, 370-71 (2004) (women provide approximately 70% of all unpaid elder care, and 16% of employed caregivers quit their jobs, 38% take

narrowed considerably in recent decades, women are still less likely to be eligible for employer-sponsored retirement plans, largely due to a higher incidence of part-time employment.[34]

Additionally, women have significantly greater lifetime financial needs than men. On average, women live two to five years longer than men.[35] Consequently, women are more likely than men to live alone in old age. [36] Women also make up 70% of

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time off, and 21% work fewer hours, which has "particularly harmful implications for women").

[34] Brown et al., *supra* note 29, at 7-8 ("In 2014, the rate of part-time employment was twice as high among women as men (66.1% vs. 33.9%, respectively). . . . The higher rate of part-time employment among women is a large factor in their lower eligibility rates for employer-sponsored retirement plans, as they may not work enough hours to be covered by their employers' plans."); Waid, *supra* note 32, at 1 ("U.S. Census Bureau data show that the majority of women who were not eligible to participate in their employer's pension plan stated that it was because they did not work enough hours, weeks, or months per year at their place of employment.").

[35] Ctrs. for Disease Control & Prevention, U.S. Dep't Health & Human Servs., Nat'l Vital Statistics Rep. No. 65-04, *Deaths: Final Data for 2014*, at 7 (2016), https://goo.gl/ajNgH4 ("In 2014, the difference in life expectancy between the sexes was 4.8 years."); *see* Waid, *supra* note 32, at 1 ("A 65-year-old woman can expect to live 2 years longer than a 65-year-old man.").

[36] *See* Waid, *supra* note 32, at 1; Leslie Bennetts, *Census Data Reveals Elder Women's Poverty Crisis*, The Daily Beast (Mar. 28, 2012), https://goo.gl/8uqum3 ("Over the age of 85, 60 percent

the nursing home population and generally incur higher medical costs.[37] According to one recent analysis, due to the longevity difference and the rising cost of health care, the average 45-year-old woman today can expect to incur $966,952 in medical expenses during her retirement, which is $208,559 (27.5%) more than the average 45-year-old man ($758,393).[38]

B. Revocation-on-divorce statutes disparately affect financially vulnerable divorced women

The gender inequality in resources and retirement security leaves women in a particularly precarious financial position compared to men. And the situation is even worse for divorced women.

Divorce often leads to "substantial, negative effects on women's total household assets and income," which can result in "financially devastating"

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of men live with a spouse, but only 17 percent of women live with a spouse.").

[37] *See* Waid, *supra* note 32, at 1.

[38] HealthView Services, *The High Cost of Living Longer: Women and Retirement Health Care* 9 tbl.4 (2016), https://goo.gl/2AKwws.

consequences.[39] According to the Government Accountability Office, in 2010, women's income fell by 41% immediately following divorce—or nearly twice as much as men's income, which declined only 23%.[40]

These steep drop-offs in income often leave women in dire financial straits after divorce, particularly as they near retirement. The poverty rate among divorced or separated women over 65 is roughly 20%,[41] with some estimates as high as 37%.[42] In 2009, some 27% of women who had divorced within the previous 12 months were found

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[39] U.S. Gov't Accountability Office, GAO-12-699, *Retirement Security: Women Still Face Challenges*, 28, 46 (2012), https://goo.gl/9mwGp4.

[40] *Id.* at 83.

[41] *See* Barbara A. Butrica & Karen E. Smith, *The Retirement Prospects of Divorced Women*, 72 Soc. Sec. Bull. 11, 11 (2012) https://goo.gl/toxRtV ("around 20 percent of divorced women aged 65 or older live in poverty"); U.S. Soc. Sec. Admin., *Income of the Population 55 or Older, 2014*, at 312 tbl.11.1 (2016), https://goo.gl/8AgLr8 (in 2014, 18.4% of divorced women over age 65 lived below the poverty line compared to 12.8% of divorced men over age 65); Diana B. Elliott & Tavia Simmons, U.S. Census Bureau, *Marital Events of Americans: 2009*, at 9 tbl.2 (2011), https://goo.gl/dtwmmc (in 2009, 21.5% of women who had divorced in the past 12 months had incomes at or below the poverty line, compared to 10.5% of men).

[42] Sandra Yin, *Older Women, Divorce, and Poverty*, Population Reference Bureau (Mar. 2008), https://goo.gl/eb0OjC.

to have less than $25,000 in annual household income, compared with 17% of recently divorced men.[43] Thus, while women generally are more likely than men to run out of resources in retirement, the problem is even worse for divorced women.[44]

As a result, when ROD statutes apply, they may pull the financial rug out from under many women precisely when they are most vulnerable, thereby compounding their financial difficulties.

C. Revocation-on-divorce statutes penalize women's choice to marry

Because women are disparately harmed by ROD statutes in the ways discussed above, they incur an economic penalty for choosing to marry their partners rather than cohabiting or otherwise not formalizing their intimate relationships. ROD statutes apply only to former *spouses*; they do not apply to former partners who never married. Thus, a beneficiary designation for a woman who chooses to get married is revoked upon dissolution of the relationship, while a designation for a woman who does not marry remains in place. This puts former

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[43] Conor Dougherty, *Children of Divorce More Likely to Be Poor*, Wall St. J., Aug. 25, 2011, https://goo.gl/eeDFzw.

[44] *See* Yin, *supra* note 42.

unmarried partners in a superior economic position vis-à-vis former spouses.

Although the drafters of the UPC promoted ROD statutes as an answer to the so-called "multiple marriage society,"[45] their practical impact exacerbates the already-considerable "marriage penalty," which may contribute to the recent rise of non-marital relationships.[46] More and more Americans are choosing to have committed long-term relationships without marriage, as evidenced by the persistent decline in the national marriage rate and sharp increase in the rate of cohabitation.[47] Even

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[45] *See generally* Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683 (1992); *see Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1319 (10th Cir. 2003) ("Professor Waggoner's view is entitled to particular respect because of his prominent role in drafting the Uniform Probate Code as well as the imprimatur given his article by the Commentary to Uniform Probate Code § 2–804, which states that '[t]he theory of this section is discussed in [Waggoner's article].'").

[46] Betsey Sevenson & Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces*, 21 J. Econ. Persp. 27, 38 (2007) (the rise of cohabitation "may reflect a lower value of the institutional structure of marriage. . . . For instance, an increasing number of dual career couples combined with high marginal tax rates on secondary earners may face a 'marriage penalty,' while increasing social acceptance of cohabitation may have diminished social stigma").

[47] *See, e.g.*, Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should*

the UPC's drafters have recognized that the interaction of these relationship dynamics with traditional wealth-transfer laws is problematic, and that "economic circumstances may dictate or influence" a couple's decision to cohabitate rather than marry.[48]

The ROD marriage penalty is not theoretical—it is evidenced by cases where ex-wives were originally designated as beneficiaries while cohabiting.[49]

Unmarried Partners Acquire Marital Rights?, 50 Fam. L.Q. 215, 216-24 (2016); Richard Fry, *No Reversal of the Decline in Marriage*, Pew Research Ctr., (Nov. 20, 2012), https://goo.gl/abtPmR; Abigail Geiger & Gretchen Livingston, *8 Facts on Love and Marriage in America*, Pew Research Ctr. (Feb. 13, 2017), https://goo.gl/AxfKxD ("The number of Americans living with an unmarried partner reached about 18 million in 2016, up 29% since 2007.").

[48] Waggoner, *supra* note 47, at 229-30, 231-35.

[49] *Compare Ohio State Life Ins. Co. v. Garcia*, 2002 WL 31867906, at *1-3 (Ohio Ct. App. Dec. 24, 2002) (revoking ex-wife's beneficiary designation where she was designated prior to marriage) *with Ping v. Denton*, 562 S.W.2d 314, 315-16 (Ky. 1978) (noting the decedent designated his ex-wife as a life insurance beneficiary "at a time when they were not married" and "retain[ed her] as the beneficiary during the period of their marriage"; and affirming her entitlement to proceeds due to recent repeal of Kentucky statute that effectively revoked most beneficiary designations on divorce); *see Strachan v. Prudential Ins. Co. of Am.*, 73 N.E.2d 840, 843 (Mass. 1947) (collecting cases providing decedent could designate cohabiting partner as beneficiary of life insurance policy); *Metro. Life Ins. Co. v. Church*, 389 N.W.2d 124, 125 (Mich. App. 1986) ("before the decedent and Church were married, and before they even

Ironically, the one-sized-fits-all approach of the UPC (which penalizes a woman's choice to marry) has spread at the same time as an individualized approach is necessary in light of significant increases in the variety and complexity of long-term relationships.[50]

II. NO SIGNIFICANT AND LEGITIMATE PUBLIC PURPOSE JUSTIFIES APPLYING REVOCATION-ON-DIVORCE STATUTES RETROACTIVELY

To withstand scrutiny under the Contract Clause, a statute that substantially impairs a contractual relationship must be found to advance a "significant and legitimate" public purpose.[51] A statute that is "limited in effect to contractual obligations or remedies"[52] or which only "protect[s] . . . a narrow

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contemplated marriage, the decedent made Church the beneficiary of this life insurance policy. The insurance policy listed Church as a 'friend'.").

[50] *See* Waggoner, *supra* note 47, at 215, 229-30 (discussing "the cultural shift in the formation of families that has been taking place in this country" and acknowledging that "[n]o one-size-fits-all generalization explains why a certain percentage of cohabiting couples continue to cohabit without getting married").

[51] *Energy Reserves Grp.*, 459 U.S. at 411.

[52] *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983).

class"[53] will not pass muster.[54] To survive a challenge under the Contract Clause, the statute must impose "a generally applicable rule of conduct designed to advance 'a broad societal interest.'"[55]

A. Revocation-on-divorce statutes rely on an outmoded conception of ex-spousal relationships

The purported public purpose behind ROD statutes is inadequate because it derives from an obsolete, dubious assumption about the nature of divorce: that divorce is a "stormy parting where the last thing one of the parties wishes is to . . . giv[e] everything to the former spouse."[56]

The dubiety of that assumption has been recognized repeatedly. As the Eighth Circuit found in *Whirlpool Corp. v. Ritter*, while some individuals might prefer to change their beneficiary designations after a divorce, that preference is far from a

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[53] *Spannaus*, 438 U.S. at 249.

[54] *See* Resp. Br. 52-53.

[55] *Eagerton*, 462 U.S. at 191 (quoting *Spannaus*, 438 U.S. at 249).

[56] Langbein, *supra* note 9, at 1669 n.14.

"universal truth."[57] Surveying the facts of the case before it, the *Whirlpool* court noted that "[i]t is certainly plausible that [the deceased life insurance policyholder] was primarily concerned about the economic well-being of his ex-wife because she had custody of his four minor children and he wanted to insure her ability to provide for their welfare."[58] In light of this, it was "equally possible" that revoking the ex-wife's beneficiary status would "frustrate," rather than "effectuate," the policyholder's intent.[59]

State courts have reached similar conclusions.[60] In rejecting retroactive application of Pennsylvania's

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[57] 929 F.2d 1318, 1323 (8th Cir. 1991); *see e.g., Metro. Life Ins. Co. v. Melin*, 853 F.3d 410, 412 (8th Cir. 2017); *MONY Life Ins. Co. v. Ericson*, 533 F. Supp. 2d 921, 928 (D. Minn. 2008).

[58] *Whirlpool*, 929 F.2d at 1323.

[59] *Id.*

[60] *See, e.g., Hughes v. Scholl*, 900 S.W.2d 606, 607 (Ky. 1995) ("[T]here are often valid reasons why an insured would want a former spouse to receive his insurance policy proceeds" and decedent's "inaction might well indicate his intent not to effect a change."); *In re Estate of Rock*, 612 N.W.2d 891, 894-95 (Minn. Ct. App. 2000) (decedent intended former wife to remain as IRA beneficiary; the divorced couple "maintained an amicable relationship, and mutually agreed to retain each other as primary beneficiaries on their IRA accounts, retirement plans or equivalent cash accounts" and "cooperated well in raising their children"); *Daughtry v. McLamb*, 512 S.E.2d 91, 92 (N.C. Ct. App. 1999) ("[T]he decedent and [former wife] remained friends after their divorce and continued to maintain a joint

ROD statute, the Pennsylvania Supreme Court recognized that "[d]ivorce does not in all cases and automatically spell the end of interest in or even concern for one former spouse by the other," and that "to hold that forthwith upon divorce the husband must be presumed to intend to terminate a contractual arrangement which benefits the other is to engage in speculation."[61] In Missouri, the legislature opted to repeal the state's ROD statute as applied to life insurance, in part because "[i]n reality, many people get divorced and still want their insurance policy beneficiary to remain unchanged."[62]

The federal government has voiced agreement with this view as well. In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), which held that federal law preempts state revocation-on-divorce laws as applied to benefits governed by ERISA, the U.S. Solicitor General emphasized that "it cannot be assumed that a plan participant would necessarily have chosen to revoke the designation of the former spouse as

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checking account. . . . [N]o attempt [was] made during the decedent's lifetime to change the beneficiary. . . .").

[61] *Parsonese*, 706 A.2d at 818 (quoting *In re Adams' Estate*, 288 A.2d 514, 517 (Pa. 1972)).

[62] Nonprobate Transfers: Hearing on H.B. 644 Before the H. Comm. on Ins., 91st Gen. Assemb., Reg. Sess. (Mo. 2001) (summary of Richard Smreker, Sr. Leg. Analyst), https://goo.gl/Rs6yww.

beneficiary . . . A participant might, out of feelings of obligation, remorse, or continuing affection, intend that the former spouse remain as beneficiary" despite their divorce.[63]

Moreover, even if the assumption at the core of ROD statutes were once defensible, recent evolution in the nature of marriage and divorce have rendered it obsolete. The increasing prevalence and fluidity of relationships that do not fit into stereotypical molds dooms any attempt to create one-size-fits-all rules about the intentions underlying individuals' relationships and their economic manifestations.

Over recent decades, as divorce has become more commonplace[64] and as no-fault divorce has proliferated,[65] it is no longer the case that a couple's

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[63] Brief for United States as *Amicus Curiae* Supporting Petitioner, *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (No. 99-1529), 2000 WL 1168615, at 23.

[64] Among adults ages 50 and older, the divorce rate more than doubled from 1990 to 2015. Renee Stepler, *Led by Baby Boomers, Divorce Rates Climb for America's 50+ Population*, Pew Research Ctr. (Mar. 9, 2017), https://goo.gl/PP8G7o.

[65] Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 Fam. Rel. 317, 322-23 (2002). Additionally, several states have enacted "collaborative divorce" statutes and procedures, which give divorcing couples a less adversarial alternative to the traditional process of dividing marital assets. *See, e.g.*, N.J. Stat. Ann. § 2A:23D-2; Fla. Stat. Ann. § 61.55. Developments

decision to divorce is necessarily "stormy." Indeed, there has been a recent marked increase in post-divorce co-parenting relationships,[66] which refutes the assumption underlying ROD statutes that, in virtually every case, divorcing couples will want to completely sever economic ties. Even published case law regarding beneficiary designations shows the trend towards more amicable and cooperative divorce.[67] These societal developments confirm that

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like these show that divorce may be more frequent, but less contentious than it once was.

[66] *See* Maria Cancian et al., *Who Gets Custody? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 Demography 1381, 1387-88 (2014) (documenting a five-fold increase in equal shared custody arrangements in divorce cases from 1988-2008).

[67] *See, e.g.*, cases discussed in note 60 *supra*; *Nat'l Auto. Dealers & Assocs. Ret. Tr. v. Arbeitman*, 89 F.3d 496, 501 (8th Cir. 1996) (couple "maintained an amicable relationship," husband "provided more support to [his former wife] and the children than he was legally obligated" to provide and "did not change the beneficiary designation" on his pension plan); *Hadfield v. Prudential Ins. Co.*, 973 A.2d 387, 388 (N.J. Super. Ct. App. Div. 2009) (ex-wife whose beneficiary status was revoked contended her divorce from the decedent "had been amicable and that they had agreed that each would maintain the other as the beneficiary on their respective life insurance policies until either married, in which event the new spouse would be named as the beneficiary").

there is no such "reality," let alone "universal truth," underlying the enactment of ROD statutes.[68]

Furthermore, if the assumption behind ROD statutes were so clear-cut, and if vindicating that assumption were such an important societal interest, it is notable that no state—not even Minnesota—has filed a brief supporting Petitioners. The states' silence belies the position that the public purpose at issue here is "significant and legitimate."[69]

B. Revocation-on-divorce statutes are irrationally founded on contradictory assumptions about decedents' personal responsibility and create legal complexity

ROD statutes rest not only upon the unfounded assumption that one would not intend to maintain an ex-spouse as a beneficiary, but also that ex-spouses do not change their designations post-divorce due to "inattention" rather than a responsible decision.[70] ROD statutes therefore assume that policyholders who do not wish to maintain their ex-spouses as beneficiaries are irresponsible. That this concern is

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[68] *Whirlpool Corp.*, 929 F.2d at 1323; *see Parsonese*, 706 A.2d at 818-19.

[69] *See* Resp. Br. 58.

[70] *See Stillman*, 343 F.3d at 1318.

not a significant and legitimate public purpose is clear when considering that ROD statutes make the contradictory assumption that policyholders who *do* want to maintain their ex-spouses as beneficiaries are not only responsible, but legal experts. In order to maintain their already-expressed desire to designate their ex-spouse as a beneficiary, a policyholder must learn of the ROD statute, determine its retroactivity, and then remember to act affirmatively to re-designate the ex-spouse.

Even then, a diligent policyholder *still* may fail to redesignate an ex-spouse given the complexity of redesignation requirements in many insurance policies.[71] Indeed, determining what constitutes a valid redesignation is a complex issue of law in its own right—one that varies by jurisdiction and that likewise requires an unrealistic level of legal acumen on the part of insureds (and insurance company representatives) attempting to effectuate their intent

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[71] *See, e.g., Metro. Life Ins. Co. v. Gorman-Hubka*, 159 F. Supp. 3d 668, 673 (E.D. Va. 2016) (designation of ex-wife was automatically revoked under Virginia's ROD statute notwithstanding that insurance company's representative had told ex-husband that he did not need to do anything to reaffirm designation if ex-wife was already the beneficiary); *Sever v. Mass. Mutual Life Ins. Co.*, 944 S.W.2d 486, 489 (Tex. App. 1997) (verbal statements to insurance agent were not effective under the applicable policy provision to redesignate ex-spouse).

post-divorce.[72] This is only one of many issues that make ROD statutes more, not less, complicated than relying on a policyholder's express written beneficiary designation. It "is perfectly clear on its face when an ex-spouse is designated as the beneficiary; it becomes no simpler or clearer merely because the [state] legislature has opted to replace the individual designated as the beneficiary with someone else, by operation of law."[73]

Moreover, choice of law issues in ROD litigation can spawn legal complexity worthy of a law school exam, thereby adding to litigation costs and draining insurance and IRA assets.[74] These problems are

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[72] *See Am. Gen. Life Ins. Co. v. Jenson*, 2012 WL 848158, at *11-14 (D.S.D. Mar. 12, 2012) (discussing varying outcomes under different states' case law as to whether redesignation of ex-wife may be accomplished only in writing or also by other expressions of intent).

[73] *MONY*, 533 F. Supp. 2d at 928.

[74] *See e.g.*, *Lazar v. Kroncke*, 862 F.3d 1186, 1193 (9th Cir. 2017) (an "Arizona state court would disregard the [California] choice-of-law provision in the Plan and instead apply Arizona's ROD statute" where the "district court did not resolve whether the choice-of-law provision governed both the Plan and the Adoption Agreement, instead concluding that the choice-of-law provision was unenforceable under Arizona law"), *pet. for cert. pending*, No. 17-521 (filed Oct. 3, 2017); *Lincoln Benefit Co. v. Manglona*, 2014 WL 3608893, at *4 (S.D. Tex. 2014) (Texas ROD statute did not apply to life insurance policy purchased in Guam because policy contained choice-of-law provision designating the applicable law as the jurisdiction in which

further exacerbated by retroactive application, which "only confuses an already dizzying area of law."[75] The contradictory assumptions underlying ROD statutes and the additional legal complexities they create belie the claim that they rationally address a significant and legitimate public purpose. Instead, they show that the statutes represent merely a "[l]egislative perception regarding the more worthy recipient" of non-probate assets.[76] Indeed, ROD statutes may be a remnant of the era when divorce laws required courts to decide which spouse was

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policy application was signed); Pet. at 1, 20, 22, *Lazar v. Kroncke*, No. 17-521, 2017 WL 4512260 (filed Oct. 3, 2017) (ROD statutes "force investment firms and other account custodians to file interpleader actions, raising thorny choice-of-law issues, incurring litigation expenses, freezing funds for extended periods of time, triggering disputes among relatives, and draining account assets . . . instead of disbursing funds to a specific, named individual, the financial institution must find the new beneficiary and navigate potential choice-of-law problems.").

[75] Kristen P. Raymond, Note, *Double Trouble - an Ex-Spouse's Life Insurance Beneficiary Status & State Automatic Revocation Upon Divorce Statutes: Who Gets What?*, 19 Conn. Ins. L.J. 399, 425 (2013) ("[S]tates that choose to adopt the modern minority rule should avoid making them retroactively applicable . . . creating more unsettlement in an already murky area of law.").

[76] *In re Workers' Comp. Fund*, 46 F.3d at 821.

"more worthy" and which was to blame for failure of a marriage.[77]

III. APPLYING REVOCATION-ON-DIVORCE STATUTES RETROACTIVELY IS NOT A REASONABLE OR APPROPRIATE MEANS TO EFFECTUATE A DECEDENT'S INTENT

Even if the Court were to find that Minnesota's ROD statute advances a "significant and legitimate" public purpose, it cannot be upheld unless it is "reasonable" and "necessary" to serve the state's purpose.[78] In other words, the Court must assess "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'"[79] Where, as here, there is no showing that a "severe disruption of contractual expectations was necessary to meet an important general social problem," any "presumption favoring

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[77] *See, e.g.*, Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1810 (1985) ("Before no-fault divorce, the law retained for itself much of the responsibility for the moral choice whether to divorce; after no-fault, most of that responsibility was transferred to the husband and wife.").

[78] *U.S. Tr. Co.*, 431 U.S. at 29.

[79] *Energy Reserves Grp.*, 459 U.S. at 412 (quoting *U.S. Tr. Co.*, 431 U.S. at 22).

'legislative judgment . . . ' cannot stand."[80]

A. Revocation-on-divorce statutes' disparate impact on women make them unreasonable means of advancing the state's purpose

ROD statutes exacerbate the economic insecurity of divorced women, and to the extent they produce any marginal benefit at all, it is far outweighed by the severe damage these statutes can cause.

Petitioners have "not explained why it is reasonable and necessary that the brunt" of individual policyholder's inattentiveness is a problem that must "be borne" by women whose husbands rely on the law as it existed at the time of their contract.[81] Nor have Petitioners explained why it is reasonable to penalize women who chose to marry, while favoring those who structure their intimate relationships differently.

Courts have expressly considered a statute's impact on gender equity in assessing whether retroactive application is reasonable when judged against a state interest. For example, the Illinois

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[80] *Spannaus*, 438 U.S. at 247 (quoting *U.S. Tr. Co.*, 431 U.S. at 23).

[81] *Univ. of Hawaii Prof. Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999).

Supreme Court, in upholding retroactive application of an equiable distribution statute, acknowledged the law could impair a "limited property interest," but found that the statute's purpose—to *promote* gender equality—justified the incursion.[82] The primary objective of the legislature, the court noted, was "to create a system of property division upon dissolution of marriage that is more equitable than that which previously existed in this State."[83] Thus, "[o]n balance," the gender equality "to be promoted by applying the [statute] retrospectively greatly outweigh[ed] the asserted property interest[.]"[84]

The ROD statute at issue here, by contrast, aggravates inequality rather than redressing it.[85] ROD statutes disparately impact divorced women, who are already at a severe structural disadvantage with respect to financial security, especially in retirement. Given the "virtually total" contractual impairment that ROD statutes cause,[86] and the devastating consequences they can inflict on divorced

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[82] *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1386-88 (Ill. 1978).

[83] *Id.* at 1388.

[84] *Id.*

[85] *See supra* Point I.

[86] *Parsonese*, 706 A.2d at 818.

women, the fact that in some cases ROD statutes happen to produce a result that coincides with a decedent's intent does not justify their existence.

B. There are solutions available to states that are far more likely to effectuate a decedent's intent than revocation-on-divorce statutes

To be deemed a valid exercise of the state's police power, Minnesota's ROD statute also must be appropriately tailored to the purpose it was designed to serve.[87] States are "not free to impose a drastic impairment [on contractual obligations] when an evident and more moderate course would serve its purposes equally well."[88]

Minnesota and other states with retroactive ROD statutes have available several alternative approaches that are far less destructive of existing contractual rights and far more likely to effectuate a divorced decedent's intent. For example, as the Pension Rights Center and National Women's Law Center have jointly suggested, states could require the administrators of non-probate assets—*e.g.*, insurance companies or financial institutions—to

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[87] *See, e.g.*, *Energy Reserves Grp.*, 459 U.S. at 412; *Spannaus*, 438 U.S. at 244.

[88] *U.S. Tr. Co.*, 431 U.S. at 31.

provide account holders with notices or new beneficiary designation forms at regular intervals.[89]

Alternatively, states could enact laws or regulations, or by judicial decision require, courts to affirmatively raise the question of beneficiary designations during matrimonial proceedings, and thereby ensure that divorce decrees or settlement agreements deal with the issue.[90] Or states could modify procedural requirements or legal ethics rules to require attorneys in matrimonial proceedings to certify that they have addressed that question with their clients.

The existence of multiple alternative solutions—any of which would far better protect a divorced decedent's intent—establishes that retroactive revocation-on-divorce statutes are neither reasonable nor appropriately tailored to their purported public purpose.

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[89] Pension Rights Ctr. & Nat'l Women's Law Ctr., *Comments to ERISA Advisory Counsel* 5 (2012), https://goo.gl/Fer4XW.

[90] *See* Resp. Br. 31-32 (discussing the approaches of Va. Code Ann. § 20-111.1(E) and Utah Code Ann. § 30-3-5(1)(e)(i)).

CONCLUSION

The Court should invalidate retroactive application of revocation-on-divorce statutes.

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Respectfully submitted,

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APPENDIX

APPENDIX OF AMICI
STATEMENTS OF INTEREST

The Women's Law Project

The Women's Law Project (WLP), founded in 1974, is a nonprofit legal advocacy organization dedicated to creating a more just and equitable society by advancing the rights and status of women throughout their lives. To advance these goals, WLP engages in high impact litigation, policy advocacy, public education, and individual counseling. Economic justice and equality for women are high priorities for WLP, including efforts to eliminate workplace inequality which contributes to the economic hardship and poverty disparately impacting women later in life, particularly women of color. WLP has represented clients challenging sex discrimination in the workplace and advocated for legal reform to achieve equity in the workplace and in retirement.

American Association of University Women

In 1881, the American Association of University Women (AAUW) was founded by like-minded women who had defied society's conventions by earning 27 college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university

partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, chief among them financial gender equality. In adherence with its member-adopted Public Policy Program, AAUW is a staunch advocate for pay equity and offers programming designed to increase financial security for women. AAUW promotes research and advocacy initiatives that highlight the burdensome impact that financial insecurity, due to debt, the wage gap and other societal factors, can have over women's lifetimes.

Atlanta Women for Equality

Atlanta Women for Equality is a nonprofit organization dedicated to providing free legal advocacy to women and girls facing sex discrimination in the workplace or school, expanding economic and educational opportunities for women and girls, and helping our community build employment and educational environments according to true standards of equal treatment. Our central goal is to use the law to overcome the oppressive power differentials and economic disparities imposed by socially predetermined gender roles and persistent discrimination.

A Better Balance

A Better Balance is a non-profit legal advocacy organization working nationally to promote fairness, equality, and justice in the workplace for women and

families. A Better Balance helps employees meet the conflicting demands of work and family through policy advocacy, outreach, and direct legal services. As part of its core mission, A Better Balance leverages the power of the law to ensure that no worker has to make the impossible choice between their job and their family. We are leading advocates for policies that combat discrimination based on family status, caregiving responsibilities, and pregnancy, and policies that help support families, including paid sick leave and family leave, flexible work, and pay equity.

California Women's Law Center

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. Since its inception in 1989, CWLC has placed a particular emphasis on addressing the economic security of women with a specific focus on aging women.

Feminist Majority Foundation

Founded in 1987, the Feminist Majority Foundation (FMF) is a national organization dedicated to women's equality, reproductive health, and the empowerment of women and girls in all sectors of society. FMF engages in research and public policy development, public education programs, grassroots organizing projects, and

leadership training and development programs. Through its work, FMF seeks to end sex discrimination and advance the legal, social, economic, and political equality of women, people of color, and LGBTQ individuals. FMF is a strong advocate for economic justice for women at all stages of their lives.

Gender Justice

Gender Justice is a non-profit legal advocacy organization based in the Midwest that works to eliminate gender barriers through impact litigation, policy advocacy, and education. Gender Justice helps courts, employers, schools, and the public better understand the root causes of gender discrimination, including with respect to economic equality and security. Gender Justice serves as counsel to women denied equal pay in the workplace and participates as amicus curiae in state and federal cases relating to economic justice that have an impact in the region.

Legal Momentum

Legal Momentum, established in 1970, is the nation's oldest 501(c)(3) organization dedicated to advancing the rights of all women and girls (http://www.legalmomentum.org/). Legal Momentum's mission is to ensure economic and personal security for all women and girls by advancing equity in education, the workplace, and the courts. Legal Momentum's targeted litigation,

education, policy advocacy, and research help to shape laws and policies that promote gender equity and ensure that these laws are properly implemented and enforced. Legal Momentum has long been concerned with women's economic security post-divorce, litigating, for example, to establish the equitable distribution of marital property at divorce. Through Legal Momentum's National Judicial Education Program (NJEP) Legal Momentum has provided judicial education about the economic value of homemaker work, the difficulties faced by long time homemakers entering the paid labor force and how judges' inadequate and unenforced alimony and child support awards have forced formerly economically secure women and their children onto public assistance.

Legal Voice

Legal Voice is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, and education. Since its founding in 1978, Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country. Legal Voice is a leading regional expert on issues of gender equality in wages, employment, and benefits. Additionally, Legal Voice has been a strong advocate for ensuring and maintaining the protections for economic gender equality.

National Partnership for Women & Families

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that promotes fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971, the National Partnership has fought to combat sex discrimination and has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts.

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities. Since its founding in 1972, the Center has focused on issues of key importance to women and girls, including economic security, employment, education, and health, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. As part of this work, NWLC fights for the economic security of older women, who, on average, live longer, have less income, and are more likely to be impoverished, than men. The Center has

participated as counsel or *amicus curiae* in a range of cases before this Court.

Pension Rights Center

Founded in 1976, the Pension Rights Center is a Washington D.C.-based, national nonprofit organization committed to protecting and promoting the retirement security of employees, retirees, and their families. Advocacy by the Center's Women's Pension Project played a critical role in the enactment of federal laws protecting the retirement rights of divorced women. Educational materials published by the Center provide helpful information about the division of retirement benefits at divorce. In addition, the Center provides legal advice to individuals going through divorce both directly and as a technical resource center for federally-funded regional pension counseling projects. Resolution of the issue presented by this case will directly impact the financial security of Center clients and countless other women throughout the nation.

Southwest Women's Law Center

The Southwest Women's Law Center is a nonprofit policy and advocacy law center that was organized in 2005 to advance opportunities for women and girls in New Mexico. It collaborates with community members, organizations, attorneys, and public officials to address economic outcomes for women and their families. It advocates for equal

rights for women who are the heads of households, and helps ensure that all individuals are treated with respect regardless of sex or gender.

Women's Institute for a Secure Retirement

The Women's Institute for a Secure Retirement (WISER) is dedicated to education and advocacy that will improve the long-term financial quality of life for women. As the only nonprofit organization to focus exclusively on the unique financial challenges that women face in retirement, WISER seeks to improve women's opportunities to secure fair pensions and adequate retirement income through research, workshops, partnerships, education materials, and outreach with lawmakers and the media. WISER operates the National Resource Center on Women and Retirement Planning, a comprehensive compendium of educational and informational materials that are used by a variety of audiences to help educate women about the need to prepare for, save for, and overcome barriers to secure income in retirement.